JUL 20 1970
E. ROBERT SEAVER, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1970

No: 419

JOHN J. McDOUGALD, Petitioner

v.

STATE OF NORTH CAROLINA, Respondent

****

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NORTH CAROLINA

****

PETITION FOR WRIT OF CERTIORARI

****

Norman B. Smith

816 Southeastern Bldg.
Greensboro, N. C. 27401
Telephone: 919-275-8552

Counsel for Petitioner

INDEX

	Page
Table of Citations	i
Opinions Below	1
Jurisdiction	1
Question Presented	2
Constitutional and Statutory Provisions Invqlved	2
Statement	4
Reasons for Granting the Writ	7
Conclusion	12
Appendix	13

TABLE OF CITATIONS

CASES:

Duncan v. Louisiana,
391 U.S. 145 (1968) 9

Evans v. City of Richmond
___ Va. ___, 171 S.E.2d 11

Lemieux v. Robbins,
414 F.2d 353 (1st Cir. 1969) 11

North Carolina v. Pearce,
395 U.S. 711 (1969) 2, 6, 7, 8, 9, 10, 11

People v. Olary,
382 Mich. 559, 170 N.W.2d 842 (1969) 11

State v. Sparrow,
276 N.C. 499, 173 S.E.2d 897 (1970) 7, 10

State v. Spencer,
276 N.C. 535, 173 S.E.2d 765 (1970) 7, 10

Torrance v. Henry,
304 F.Supp. 725 (E.D.N.C. 1969) 10, 11

United States v. Jackson,
390 U.S. 570 (1968) 10

CONSTITUTIONAL PROVISIONS:

Constitution of the United States, Amendment VI 2-3
Constitution of the United States, Amendment XIV, Section 1 3

STATUTES:

General Statutes of North Carolina, Sec. 7A-196(b) 3, 9
General Statutes of North Carolina, Sec. 7A-272(a) 3-4, 10
General Statutes of North Carolina, Sec. 7A-290 4, 8
General Statutes of North Carolina, Sec. 15-177.1 4, 8

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. _____

JOHN J. McDOUGALD, Petitioner

v.

STATE OF NORTH CAROLINA, Respondent

****

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NORTH CAROLINA

****

The petitioner, John J. McDougald, prays that a writ of certiorari issue to review the order of the Court of Appeals of North Carolina, entered in the above entitled case on April 23, 1970.

OPINIONS BELOW

The order of the Court of Appeals of North Carolina of April 23, 1970, denying certiorari to the Superior Court Division of the Cumberland County General Court of Justice is unreported. The order of the Superior Court Division of the Cumberland County General Court of Justice, entered in this case on March 17, 1970, is also unreported. Copies of both orders are appended to this petition.

JURISDICTION

The order of the Court of Appeals of North Carolina was made and entered on

April 23, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3), since a right is claimed under the Constitution of the United States. By reason of Section 7A-28 of the North Carolina General Statutes the order of the Court of Appeals is final and not subject to further review by the Supreme Court of North Carolina.

QUESTION PRESENTED

Whether harsher sentencing of a de novo appellant upon reconviction, where not based on identifiable conduct subsequent to the first sentencing proceeding, violates the principles of Due Process enunciated in North Carolina v. Pearce and where trial by jury is available only on appeal imposes an unconstitutional burden on the exercise of this right.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States:

AMENDMENT VI.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with

the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT XIV.
Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

General Statutes of North Carolina:

Section 7A-196(b)

In all criminal cases there shall be no jury trials in the district court. Upon appeal to superior court trial shall be de novo, with jury trial as provided by law.

Section 7A-272(a)

Except as provided in this article, the district court has exclusive, original jurisdiction for the trial

of criminal actions, including municipal ordinance violations, below the grade of felony, and the same are hereby declared to be petty misdemeanors.

Section 7A-290

Any defendant convicted in district court before the magistrate may appeal to the district court for a trial de novo before the district court judge. Any defendant convicted in district court before the judge may appeal to the superior court for a trial de novo. ****

Section 15-177.1

In all cases of appeal to the superior court in a criminal action from a justice of the peace or other inferior court, the defendant shall be entitled to a trial anew and de novo by a jury, without prejudice from the former proceedings of the court below, irrespective of the plea entered or the judgment pronounced thereon.

STATEMENT

Petitioner is a prisoner in the custody of the North Carolina Department of Correction serving sentences which total six years' imprisonment to be followed by two years under suspended sentences.

On February 20, 1969, in the District

Court Division of the Cumberland County (North Carolina) General Court of Justice, petitioner was tried on four charges of breaking and entering coin machines and three charges of contributing to the delinquency of a minor. The Court found petitioner guilty on each charge and sentenced him under a consolidated judgment to a term of eighteen months' imprisonment.

In apt time petitioner appealed from this sentence to the Superior Court Division of the Cumberland County General Court of Justice for a trial de novo by jury. On April 3, 1969, following verdicts of guilty on the same charges, the Court sentenced petitioner to three sentences of two years' imprisonment each, running consecutively, for a total of six years' imprisonment, and four two-year suspended sentences to run concurrently at the expiration of the active sentences.

On the trial de novo in the Superior Court Division there was no evidence of any aggravating circumstances which had not been presented for consideration of the District Court. In all material respects the evidence and contentions of the parties were the same in the trial in the District Court Division and the trial in the Superior Court Division.

Petitioner first raised the federal questions sought to be reviewed in this Court in his Petition for Post-Conviction Relief filed on January 27, 1970, in the Superior Court Division of the Cumberland

County General Court of Justice, pursuant to North Carolina General Statutes, Section 15-217, et. seq. In this petition, the above facts were recited and petitioner prayed that his present sentences be set aside or modified by reduction to conform to the sentence imposed on February 20, 1969, in the District Court Division.

By order of March 17, 1970, the Presiding Judge denied the petition without a hearing, taking the facts pleaded above to be true and concluding that on the face of the petition the petitioner was not entitled to the relief requested. The Court found without merit the petitioner's contention that the increase in sentence following reconviction on appeal violated his rights under the Constitution of the State of North Carolina and the Constitution of the United States.

Petitioner in apt time petitioned the Court of Appeals of North Carolina for a writ of certiorari to review the decision of the Superior Court Division of the Cumberland County General Court of Justice in the post-conviction proceeding. Petitioner in his Petition and Application for Writ of Certiorari carried forward the constitutional challenges to his increased sentence. Petitioner maintained that the Superior Court's prerogative to increase petitioner's sentence unconstitutionally burdened his right to appeal and to a trial by jury and was inconsistent with the principles established by this Court in North Carolina v. Pearce, 395 U.S. 711 (1969). The Court of Appeals

of North Carolina on April 23, 1970, denied the petition for certiorari without opinion.

REASONS FOR GRANTING THE WRIT

1. The decision below should be reviewed because the courts of North Carolina have decided an important question of federal constitutional law which has not been ruled upon specifically by this Court in a way which is inconsistent with the principles established in applicable decisions of this Court.

The result in the present case was approved by the Supreme Court of North Carolina in State v. Spencer, 276 N.C. 535, 173 S.E.2d 765 (1970) and in State v. Sparrow, 276 N.C. 499, 173 S.E.2d 897 (1970). The Supreme Court of North Carolina in these cases held that this Court's decision in North Carolina v. Pearce does not "apply to judgments pronounced on appeal from inferior tribunals," and specifically does not preclude imposition of more severe punishment following reconviction upon appeal through the North Carolina de novo trial procedure.

The position of the North Carolina courts, however, contravenes the applicable constitutional principles in Pearce. In order to insure that vindictiveness against a defendant who has successfully pursued a statutory right of appeal or collateral remedy not affect his sentence on reconviction, this Court in North

Carolina v. Pearce concluded that as a matter of due process

> whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal. 395 U.S. 711, 726.

The reasons articulated by this Court for its decision in Pearce apply with equal force to North Carolina's de novo trial procedure. Under North Carolina law the only judicial review which is open to a defendant following conviction in the District Court Division, and a necessary step in obtaining further appellate review, is an appeal for a trial de novo in the Superior Court Division. See N.C. Gen. Stat. § 7A-290. When petitioner appealed to the Superior Court Division, his first conviction was treated under North Carolina law as void in the same way his conviction would have been treated had he been successful on a conventional appeal. See N.C. Gen. Stat. § 15-177.1.

The potential for retaliatory sentencing and apprehension by defendants of retaliation through increased punishment for exercising their right of appeal are present in the North Carolina de novo trial procedure as much as in the circumstances in Pearce.

For all practical purposes one appealing for a trial de novo in the Superior Court Division in North Carolina is in the same position as other successful appellants who are now protected from retaliatory sentencing under Pearce. That a harsher sentence can be imposed following a trial de novo has the same chilling effect on a defendant's exercise of his right to appeal that this Court found objectionable in Pearce.

Moreover, not only does the position of the North Carolina courts violate due process as defined in Pearce, it also unconstitutionally burdens the defendant's Sixth Amendment right to trial by jury, which in Duncan v. Louisiana, 391 U.S. 145 (1968), was made applicable to the states through the Fourteenth Amendment.

In North Carolina trial by jury is available to a defendant only in the Superior Court Division. N.C. Gen. Stat. § 7A-196(b). There is no machinery by which a defendant may waive his non-jury trial in the District Court Division in order to have his jury trial in the Superior Court Division when he is charged with an offense which comes within the exclusive

original jurisdiction of the District Court. All misdemeanors, including serious offenses punishable with a maximum of two years' imprisonment, as was true in the instant petitioner's cases, are within the exclusive original jurisdiction of the District Court Division. N.C. Gen. Stat. 7A-272(a). Thus, the petitioner's right to trial by jury, as well as his right to appeal, were chilled by the Superior Court Division's prerogative to increase petitioner's sentence. See United States v. Jackson, 390 U.S. 570 (1968).

2. The decisions of state and federal courts in North Carolina and the decisions of courts in other jurisdictions on the important constitutional question presented are inconsistent, and an authoritative statement from this Court is needed to insure uniformity of decisions.

The position of the United States District Court for the Eastern District of North Carolina on the constitutional question presented is directly opposite to that of the Supreme Court of North Carolina. The result reached by the United States District Court in Torrance v. Henry, 304 F.Supp. 725 (E.D.N.C. 1969), is directly contrary to the decisions in State v. Spencer, 276 N.C. 535, 173 S.E. 2d 765 (1970), and State v. Sparrow, 276 N.C. 499, 173 S.E.2d 897 (1970), on this question. In Torrance v. Henry, Chief Judge Butler concluded,

> Applying the reasoning underlying Pearce, we perceive no material

distinction between a case where the defendant's original conviction has been set aside, whether by appeal or collateral proceedings, and a new trial ordered, and a case where the defendant has appealed his original conviction, and received a trial de novo. In either case a harsher sentence at retrial is a violation of due process, unless justified by the subsequent events requirement as enunciated in Pearce. 304 F.Supp. 725, 726.

Several courts which have considered the question presented are in accord with the North Carolina state courts that the principles enunciated in North Carolina v. Pearce do not extend to a de novo appellant on reconviction. These decisions, which are contrary to the position taken in Torrance v. Henry, include the decision of the United States Court of Appeals for the First Judicial Circuit in Lemieux v. Robbins, 414 F.2d 353 (1st Cir. 1969), the decision of the Supreme Court of Michigan in People v. Olary, 382 Mich. 559, 170 N.W.2d 842 (1969), and the decision of the Supreme Court of Appeals of Virginia in Evans v. City of Richmond, ___ Va.___ , 171 S.E.2d 247 (1969).

A decision is needed from this Court on the important constitutional question presented to insure uniformity of results within North Carolina, where state and federal decisions now conflict, and among state and federal courts in other

jurisdictions.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Norman B. Smith
Counsel for Petitioner

Norman B. Smith
Smith & Patterson
816 Southeastern Bldg.
Greensboro, N. C. 27401
Telephone: 919-275-8552

APPENDIX TO PETITION

ORDER OF THE COURT OF APPEALS

OF NORTH CAROLINA DENYING PETITION

FOR ~~CERT~~IORARI

John J. McDougald

versus

State of North Carolina

No. 70SC122PC

Denied by order of the Court in Conference. The 23rd day of April, 1970.

****

ORDER OF THE SUPERIOR COURT

DIVISION OF THE CUMBERLAND COUNTY

GENERAL COURT OF JUSTICE

NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE

CUMBERLAND COUNTY SUPERIOR COURT DIVISION

John J. McDougald, Petitioner

versus

State of North Carolina

70CR6585

ORDER

This cause coming on to be heard upon a petition for Post Conviction Hearing relief filed by petitioner against the State of North Carolina, under date of 27 January, 1970, and it appearing to the Court and the Court finding as a fact from said petition that the petitioner-defendant is now being held under three sentences of two-years' imprisonment, each running consecutively for a total of six years' imprisonment, said sentences being imposed upon the petitioner by the Honorable W. H. S. Burgwyn, Jr., Judge Presiding over the Cumberland County Superior Court under date of April 3rd, 1969, for three separate charges of contributing to the delinquency of a minor, under G.S. 110-39; and it further appearing to the Court and the Court finding as a fact that the petitioner was tried for these same three offenses in the District Court Division of the General Court of Justice of Cumberland County, North Carolina, on February 20, 1969, and the Honorable Joseph E. Dupree, Judge Presiding, found the petitioner-defendant guilty under a consolidated judgment of the three cases, wherein the defendant received a judgment of eighteen months in the North Carolina Department of Correction; that thereafter in apt time the defendant-petitioner appealed for a trial de novo in the Superior Court Division of the General Court of Justice of the State of North Carolina and at that Session of Court referred to the three two-years consecutive sentences were imposed upon him by the Honorable W. H. S. Burgwyn, Jr., Judge Presiding, and the petitioner

contends that there was no evidence showing any aggravated circumstances between the trial in the District Court and the trial in the Superior Court and that the increase of the sentence from eighteen months to three two-years consecutive sentences or a total of six years, violated his rights under the Constitution of the State of North Carolina and the Constitution of the United States, in that it exceeded the sentence which he had received in the District Court Division.

The Court finds as a fact that the contention of the petitioner is without merit, either in law or otherwise, in that he appealed for a de novo trial, which allowed the Superior Court then presiding to impose a sentence which was within the limits allowed by statute, and that said W. H. S. Burgwyn, Jr., Judge Presiding, did not exceed the statutory maximum in imposing a judgment of three consecutive two-years' sentences for the charges for which the defendant was tried.

Now, therefore, upon the foregoing findings of fact, the petition of the defendant-petitioner, John J. McDougald, is denied, without a hearing of the petitioner, as on the face of the petition it appears that the petitioner is not entitled to the relief requested.

This the 17th day of March, 1970.

/s/Hamilton H. Hobgood
Judge Presiding